IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER No. 516 OF 2006

Dharen K. Upadhyay & ors. .. Appellants

versus

M/s.India Finance & Construction Company (P) Ltd. .. Respondents

...

Mr.M.P. Vashi i/.b M/s.M.P. Vashi & Associates for the appellants.
Mr. Y.S. Jehagirdar i/b Mr.D.R. Shah for the respondent.

ALONG WITH

APPEAL FROM ORDER NO. 517 OF 2006

Dharen K. Upadhyay & ors. .. Appellants

versus

Municipal Corporation of Gr.Mumbai & Anr. .. Respondents

...

Mr.M.P. Vashi i/.b M/s.M.P. Vashi & Associates for the appellants.

Mr. Mr.J. Reis with Mrs.Geeta Jogalekar for BMC.

Mr.Y.S. Jehagirdar i/b D.R. Shah for respondent no.2

CORAM : D.G. KARNIK, J

DATED : 11th December 2006

ORAL JUDGEMENT:-

Heard the counsel. By consent, heard finally at the stage of admission.

1. These two appeals are directed against the common order dated 26th June 2006 passed by the Learned Judge of the City Civil Court in Notice of Motion no.4264 of 2004 in L.C. Suit no.4614 of 2004 and Notice of Motion no.1435 of 2004 in L.C. Suit no.5020 of 2004.

2. The respondent no.1 in AO No. 516 of 2006 - India Finance and Construction Co. Pvt.Ltd (hereinafter referred to as 'the Company') is the owner of the property bearing plot 2/4 at TPS I, Vile Parle (East) at Mongibai Road, Mumbai 400 057. (hereinafter refered to as the 'suit property'). The property is a large piece of land and faces Mongibai Road. Back side of the suit property abuts Lala Bhishambharnath Road. A sketch of the property is annexed to the inspection report dated 7th November 2006 filed by the Court Commissioner.

3. Mongibai Road has been declared as hawking zone by the Mumbai Municipal Corporation (for short 'the MMC') the respondent no.1 in Appeal no.517 of 2006.

Several licenced hawkers carry on business on Mongibai Road for past several years. The appellants are the hawkers who claim to possess the hawking licences permitting them to hawk on the Mongibai Road.

4. The Company, intending to develop the suit property got the plans of the proposed construction approved by the MMC. The approved plans of the proposed new building show that the company wants to construct a multi storeyed building with a shopping mall and car park in the basement. The shops on the front i.e. south side face Mongibai road. There is also an internal passage running south north inside the building and several shops having their opening in their internal passage of the building. Toilets and lifts are on the back side of the building. Two gates are proposed on the front side, one towards the south eastern end and the other towards the south western end of the plot for ingress and egress to the building. Each of the gate is about 18’ wide. In addition, there is one exit on the rear side opening on Lala Bhishambarnath road. Several hawkers occupy a part of Mongibai Road abutting the suit property. The appellants appear to occupy part of the Mongibai road adjoining to and abutting the two gates proposed to be made on the south eastern and south

western side of the suit property.

5. Apprehending that the Company would open the gates to their property by breaking the existing compound wall and thereby dislocate them. The appellants filed a suit, bearing L.C. Suit no.5020 of 2004, against the MMC and the Company for an injunction restraining the Mumbai Municipal Corporation from granting permission to the Company to make the gates in the Southern compound wall and for an injunction restraining the Company from putting up the two gates as proposed by it in the plan.

6. Apprehending that the appellants would prevent it from making the gates in the southern compound wall of the suit property as per the plans sanctioned by the MMC for access to the proposed building in the suit plot, the company filed a suit, bearing Suit no.4614 of 2004, for an injunction restraining the appellants from preventing with the Company from putting up the gates to the suit property and for an injunction restraining the appellants from encroaching and trespassing on the suit property. In the respective suits, the appellants and the Company took out the motions for interim reliefs in the aforesaid terms pending the decision of the suits.

By a common order dated 26th June 2006, the learned Judge of the City Civil Court restrained the appellants-hawkers by an injunction from obstructing the ingress and egress to the suit property through the two gates as per the plan sanctioned by the MMC. It further held that the appellants were free to hawk on any other place on Mongibai road as per the squatters licence. Aggrieved by the said common order, the appellants hawkers have filed these two appeals challenging the common order.

7. Mr.Vashi, learned counsel for the appellants submitted that appellants have a fundamental right to live and right to work and the said right includes a right to carry on the business on the public streets. He submitted that this right is recognised by the Supreme Court in Sodan Singh and Ors. Vs. New Delhi Municipal Committee and ors. reported in 1989 (4) SCC 155. He further submitted that the appellant hawkers are carrying on the business on Mongibai road abutting the suit property for many years and that if the company is allowed to open the two gates in the south eastern and south western corner of the suit property opening on the Mongibai Road, then appellants would be uprooted from their place of business. Place of business of the

appellants is situated in front of and abutting the proposed gates. If any part of the southern compound wall of the suit property is removed by the Company for making the two gates the appellants would not be able to carry on their business as the appellants are carrying on business exactly in front of the location of the proposed gates. He therefore submitted that the company cannot be permitted to open the gates as sanctioned by the MMC in the proposed building plan. He submitted that the right of the company to carry on business on its property can be subjected to a reasonable restriction of not to carry out the business in such a way as to uproot the appellants - hawkers from their usual place of business on the Mongibai Road.

8. Mr.Jehagirdar, learned counsel for the Company and Mr.J. Reis learned counsel for the MMC rebutted the submissions of Mr.Vashi. Conceding that appellant may have a right to carry on the business on Mongibai road as the same has been declared to be a hawking zone, Mr.Jahagirdar submitted that appellants have no right to carry on business in such a way as to obstruct the company to carry out the business on the suit property. The company is entitled to have reasonable ingress and egress to the building proposed to be constructed on the

suit property. In particular, he submitted that the appellants have no right to carry on their business in such a manner as to obstruct the vehicular or pedestrian traffic nor to obstruct access to the shops and residences of others. He submitted that the two proposed gates in the south eastern and south western corner of the suit property facing Mongibai road were meant for providing reasonable access to the shopping complex proposed to be constructed on the suit plot. The appellants cannot carry out their business so as to obstruct the reasonable access to the suit property. He further submitted that appellants as hawkers have no right to put up any tables, stands or build any structure on the road much less to do so in such a manner so as to obstruct the company's access to the proposed building on the suit property. Mr.Reis, learned counsel for the MMC supported Mr.Jehagirdar and further submitted that the MMC as a planning authority had a right to pass the plans for the proposed construction. Before sanctioning the plans as the planning authority, the MMC took into consideration the needs of providing reasonable access for the vehicles to the parking space in the basement of the proposed building and sanctioned opening of the two gates in the south eastern and south western corner of the suit

property facing Mongibai Road. The MMC as a planning authority has a right to pass the building plans and it cannot be prevented from performing its public duty of sanctioning of the building plans and requiring provision of the gates for access to the suit property as a condition of sanction of the building plans. He therefore submitted that no injunction can be granted restraining the MMC from sanctioning of the gates nor can injunction be granted against the company restraining it form providing the two gates to the suit property.

8. Mr.Vashi submitted that the property of the company was huge and extends from one road to the other. One end (viz. the southern end) of the property faces Mongibai road and the other end (viz. the northern end) faces another road viz.Lala Bhishambarnath Road. The company has an access to the suit property from Lala Bhishambharnath Road and there is no need to have any access from the front. The company has a reasonable access to its property and permitting the opening of two gates on the front side was not necessary to carry out the business.

9. In Maharashtra Ekta Hawkers Union & Anr. Vs.

Municipal Corporation, Greater Mumbai & Ors. reported in 2004(1) SCC 625, the Supreme Court, after considering the ratio of the decision of the Constitution Bench in the case of Olga Tellis & Ors. Vs. Bombay Municipal Corporation & ors. reported in (1985) 3 SCC 545 and the decision of another Constitution Bench in Sodan Singh Vs. New Delhi Municipal Committee reported in (1989) 4 SCC 155, has held that the hawkers' right to carry on business on a hawking street is not unrestricted but is subject to certain conditions. The conditions laid down by the Supreme Court in paragraph no.14 of its decision, intralia include: -

i) Hawkers shall do the business in such a manner that the vehicular and pedestrian traffic is not obstructed and access to shops and residences is not blocked. Even when hawking is permitted, it can only be on one side of footpath or road and under no circumstances on both sides of the footpath or road.

ii) Hawkers must not put up any stall or place any tables, stand or such other thing or erect any type of structure. They should also not use handcarts. However, they may protect their goods from the sun, rain or wind.

10. The hawkers are not allowed to hawk on both sides of the road nor are they allowed to carry out their business in such a manner so as to obstruct access to the shops and residences of others. The hawkers are not permitted to put up any tables, stands or erect any type of structure. As there was some controversy between the parties about the existing situation of the suit property as also of the hawkers this Court appointed M/s.Parelkar & Dallas, Architects as a Court Commissioner for the purpose of local inspection of the property. Accordingly, the Court Commissioner visited the property and has submitted his report dated 18th November 2006. The Commissioner has also drawn a sketch plan and has taken photographs of the site. The sketch and photographs show that if the appellants are permitted to hawk at their present position, the suit property would have no access from Mongibai Road which is the main road to which the suit property faces. The photographs further show that the appellant hawkers are committing breach of the directions given by the Supreme Court in Maharashtra Ekta Hawkers Union Vs. Municipal Corporation of Greater Mumbai (Supra). They have kept tables and stands on the road and are exhibiting tomatoes, potatoes and vegetables on such tables. The hawkers completely cover the entire frontage of the suit

property which is left with no access whatever from the Mongibai Road. This is a breach of the first condition laid down in paragraph no.14 of the decision of the Supreme Court which says that the hawkers cannot block the access of the shops and residences. It cannot be said that hawkers have a fundamental right to hawk in the manner in which they are presently doing their business.

11. The permission granted by the MMC to the Company to open two gates, one in the south western corner and the other in the south eastern corner of the suit property facing Mongibai Road cannot be said to be unreasonable restriction on the right of the appellants to carry out trade. The hawking licence permits the appellants to hawk and carry on the business on Mongibai road but not at any specific place on the Mongibai road. Licence granted by the Corporation cannot be interpreted to mean that the appellants can carry out the business in such a manner and in such a place as to completely block even the access to the owners to their property. If the Company is not allowed to open the gates, its property would not have any access from the Mongibai Road at all. The access from the rear side Lala Bhishambarnath Road cannot be said to be sufficient, taking into consideration the large extent of the

property wherein a shopping mall is proposed to be constructed. The company must have reasonable access to its own property. The MMC as a planning authority is an expert authority to consider what is reasonable access to the property. Nothing is brought on record to show that the discretion exercised by the MMC in permitting opening of two gates in the south eastern and south western corner of the suit property abutting Mongibai Road is in any way perverse. The decision of the planning authority which is not shown to be contrary to any law must be presumed to be correct.

12. In my view, the trial court committed no error in granting injunction in favour of the company restraining the appellants from preventing the company from opening the gates as permitted by the MMC. For these reasons, there is no merit in the appeals. The appeals are accordingly dismissed.

13. After this decision was pronounced in the open court, Mr.Vashi learned counsel for the appellants who are licensed hawkers submitted that the appellants want to move the MMC for granting them permission to hawk at some other place on the Mongibai Road. Needless to say that if such application is made by them within four

weeks hereof the MMC would consider the same expeditiously on its own merits. Mr.Vashi further requests that status quo may be maintained for reasonable time to enable the appellants to make the application to the MMC. Accordingly, the company shall not open the gates for a period of six weeks from today. However this would not prevent the company from carrying out the construction of the building on the suit plot.

(D.G. KARNIK, J)